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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1033

LINDA McINNIS et al.,
Appellant,

vs.

SAMUEL H. SHAPIRO, et al.,
GOVERNOR OF THE STATE OF ILLINOIS,
Respondent.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Motion for Leave to File Brief of Amici Curiae re Jurisdictional Statement of Appellants and Brief of Amici Curiae re Jurisdictional Statement of Appellants

SAN FRANCISCO NEIGHBORHOOD LEGAL ASSISTANCE FOUNDATION
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NATIONAL ASSOCIATION OF SOCIAL WORKERS
LEAGUE OF WOMEN VOTERS OF ILLINOIS
CHICAGO REGION OF THE ILLINOIS CONGRESS OF PARENTS AND TEACHERS
SOUTH SUBURBAN HUMAN RELATIONS COUNCIL
INTER-COMMUNITY PROGRAMS, INC.
CALIFORNIA RURAL LEGAL ASSISTANCE
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SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC.

The undersigned hereby move for leave to file the attached brief relating to the jurisdictional statement of appellants.

INTEREST OF AMICI CURIAE

The undersigned represent a number of persons and organizations all of whom have been involved for some time in various ways in the problem of public school financing.

Attorneys for the San Francisco Neighborhood Legal Assistance Foundation and the Western Center on Law and Poverty represent plaintiff school children who are in a class action challenging the financing structure of the California public education system on equal protection grounds. A demurrer was sustained to the complaint in that case on the sole authority of the district court opinion in *McInnis v. Shapiro.*

Attorneys for plaintiffs in *Serrano*[1] are currently preparing an appeal to the California District Court of Appeal. The ultimate decision in *McInnis* is likely to determine the result in *Serrano v. Priest,* as it has already done at the complaint stage in the lower court. Accordingly, the disposition of *McInnis* also may well determine the quality and structure of California public education for years to come. Accordingly, California Rural Legal Assistance, representing the rural poor of California, are interested in *Serrano v. Priest.*

The American Jewish Congress and the National Association of Social Workers, as national organizations, and the League of Women Voters of Illinois, the Chicago Region of the Illinois Congress of Parents and Teachers, South Suburban Human Relations Council, Inter-Community Programs, Inc., as local organizations, have been specially concerned with the improvements of the quality of education and the advancements of equality of educational

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1. *Serrano v. Priest,* No. 938254, Sup. Ct. of Calif., Los Angeles, County, decided January 13, 1969.

opportunity for children of all races and creeds. An outgrowth of that concern is the participation of the aforementioned groups with the exception of the Chicago Region of the Illinois Congress of Parents and Teachers, in an Amici Curiae Brief filed with the District Court in the instant case.

The American Jewish Congress has 23 Illinois membership chapters in Greater Chicago. The League of Women Voters of Illinois is a nonpartisan voluntary organization embracing 76 local chapters with an aggregate membership of approximately 9,000 citizens of Illinois. The South Suburban Human Relations Council is an umbrella organization effective in 51 South Cook County communities in coordinating and supporting local human relations councils and civil rights groups. The National Association of Social Workers is a professional organization of 50,000 social workers having a Master's degree in such work. Unequal education, defacto segregation, the need for community schools and compensatory education have been of long standing concern to that group. Inter-Community Programs, Inc. is an organization devoted to the development of experimental educational programs, particularly those involving utilization of the resources of the entire metropolitan area. The Scholarship, Education and Defense Fund for Racial Equality, Inc. has scholarship and leadership training programs and legal service activities devoted to the interest of persons who are discriminated against because of their race or economic condition.

The undersigned are concerned because the current procedural posture of the instant case (i.e., a determination without any evidence being presented) will make it almost impossible for the court in other states to know and understand the basis of the *McInnis* result. We are also con-

cerned because we believe that the court below has misunderstood the issues and the applicable law.

Finally, we believe it important that, in determining whether to give the appeal plenary consideration, and in determining the merits (if they are reached) the Supreme Court have the opportunity to appraise the impact of the decision on other states.

Accordingly, we request leave to file the attached brief.

Dated: February 5, 1969.

Respectfully submitted,

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SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC.

The nature of the interest of amici curiae is stated in the attached motion and is incorporated herein.

SUMMARY OF ARGUMENT

I

The decision below was based largely upon factual assumptions not appearing in the complaint, and without evidentiary support. The court simply assumed that there were rational explanations in fact for the gross differences in expenditures by Illinois upon school children. It further assumed, without any expert testimony (or even any evidence as to how the financing scheme operates in fact) that there were no judicially manageable standards. In this procedural posture, summary disposition of the appeal by the Supreme Court would be based on inadequate information and would provide limited guidance for similar litigation now in the lower courts. Therefore, the Supreme Court should note probable jurisdiction and either postpone plenary consideration in order to permit consolidation with other cases, or reverse the lower court.

II

The court below erred in failing to balance relevant factors, such as the irreparable harm to school children, the availability of alternative methods of achieving the state's goals, and the fundamental nature of the right to an education. Instead, it implicitly and incorrectly assumed that a "rational explanation" for the financing scheme was automatically a constitutionally adequate justification for the widely disparate amounts of money spent from school district to school district.

III

The complaint pleads sound causes of action under applicable law. It alleges that education is a state responsibility, and that as a result of the way in which the state has structured its financing system around "school districts," children within the state receive unequal educational opportunity depending on the accident of the wealth (tax base) of the school district in which they reside.

ARGUMENT

I. The Supreme Court Should Reverse Because the Court Below Was Procedurally Incorrect in Sustaining a Demurrer on the Basis of Assumed Facts Which Had No Evidentiary Basis.

The court's only function at this initial procedural stage was to assume that all allegations of the complaint were true and then to determine whether plaintiffs had pleaded a cause of action. The court below failed to do this. It clearly erred in assuming as true facts outside of the complaint and wholly without evidentiary support. Moreover, the court did this not once, but twice. With no evidence before it, the court below assumed that in fact there was a rational basis for the financing structure of the public educational system. And without giving plaintiffs an opportunity to present expert testimony or any evidence, and without a single first-hand account of even how the financing system operates, the court then further assumed that there were no "judicially manageable standards so as to make the controversy justiciable." The extraordinary action of the court below in deciding a case at the complaint stage on the basis of facts never presented is not only procedurally incorrect and increases the chances of the court being wrong as to the facts, but makes it impossible to know the basis of the court's decision. This Court has previously indicated the vices inherent in a premature resolution of constitutional issues—*Rescue Army v. Municipal Court,* 331 U.S. 549 (1947); *Borden Farm Products Co. v. Baldwin,* 293 U.S. 194 (1934).

For example, suppose a plaintiff in California should seek to have an expert witness testify about a clear and efficient formula (hypothetical formula "Z") which would provide a judicially manageable standard and would not contain the invidious discriminations of the present system. (Plaintiffs in California have specifically alleged that just

such alternative formulas exist which would not violate the equal protection clause). Is the California court to assume that formula "Z" was considered by the court below in the instant case? No court will ever know, since plaintiffs in the instant case were not given an opportunity to put on any evidence.

Similarly, the court below states "where differences do exist from district to district, they can be explained rationally." Aside from the court's error in seeking to justify an invidious discrimination by a "rational basis" what "explanations" were considered by the court? For example, is the state's desire to encourage local educational experimental programs one reason for differences in expenditures from district to district? If so, has a single experimental program ever emerged in fact as a result of giving one school district twice as much as other districts? Indeed, is there any basis in fact for the assumption that local control of schools requires that each school district expend upon itself the money it raises within its own district? The evidence might well show that in some states there is no "local control" in any realistic sense, and that the state already controls curriculum, hiring, textbooks, and every other important detail of the educational process. If so, local control as a rational basis for the financing scheme may prove to have no basis in fact. Worse, if the instant case were to be affirmed, the court in California will have no way of determining whether the particular "rational basis" advanced by the California legislature to justify its financing structure was considered at all by the Three-Judge District Court below. Moreover, when the California court seeks to balance the proposed justification for its school financing scheme against the inequities of that scheme, the California court will not know how serious the

injustices were in fact in the Illinois schools. In short, the California court, like any other court in a similar case, will not know the harm to children considered by the Illinois court.

The decision below was simply procedurally incorrect. See generally, Karst, *Legislative Facts in Constitutional Litigation,* 1960 The Supreme Court Review 75 (1960). Moreover, by reversing that decision, this Honorable Court will allow evidence to be presented which will not only (1) decrease the substantial chances of the court below being factually mistaken, and (2) provide this Court with the data essential to reaching an informed judgment but which will (3) provide an evidentiary basis so that other courts can be guided by the ultimate decision. See *United States v. International Union,* 352 U.S. 567 ( ). At the same time, other cases (already filed) will be presented and argued in at least Texas, California, Virginia and Michigan, each with a somewhat different financing structure, different complaint, and different theories. Accordingly, assuming that this Court reverses and the matter comes before it again, this Court will then (in place of the present utterly barren record) presumedly have the assistance of several lower court decisions, numerous briefs and substantial evidentiary records.

II. The Court Below Erred In Assuming That a Rational Explanation for Differences from District to District Would Constitutionally Jusify Discrimination on the Basis of Wealth and Geography.

The court below argues that the existing financing scheme, which provides school children with wealthy neighbors (i.e., higher tax base) a far superior education to poor children (i.e., school district with low tax base) does not violate the equal protection of the laws because such an

unequal system can be "explained rationally." Such an argument involves a miseonception of both the facts and the applicable law.

1. A "rational basis" will not validate discrimination based on wealth or race. *Brown v. Board of Education,* 347 U.S. 483 (1954); *Griffin v. County School Board,* 377 U.S. 218 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966) (poll-tax); Griffin v. Illinois, 351 U.S. 12 (1956); *Jackson v. Pasadena City School District,* 59 California 2d 876 (1963); *Douglas v. California,* 372 U.S. 353 (1963).

2. A "rational basis" will not justify an unequal application of the laws where fundamental rights of citizenship, such as education and voting, are involved. Each of the above cases will support the foregoing statement of law. See also *Reynolds v. Sims,* 377 U.S. 533 (1964) and *William v. Rhodes,* 89 Supreme Court 5 (1968) (Wallace on ballot). As the court said in *Brown,* 347 U.S. 483 at 493:

> "Education is perhaps the most important function of states and local governments... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Denial to some children of substantial equality of educational opportunity is denial irreparably to those children of an equal opportunity "to succeed in life." This is the interest which is being infringed by the present method of financing public education in many states, including Illinois and California. The opinion of the court below contends that plaintiffs can be constitutionally subjected to this injury if there is a "legitimate legislative policy" supporting the scheme. As a matter of law, that is simply not so.

3. Geographical variations within a state based on local governmental lines are not a constitutionally adequate basis for substantial inequalities in educational opportunity or voting. *Reynolds v. Sims, supra; Griffin v. County School Board of Prince Edward County, supra.*

4. Plaintiffs cannot be deprived of the equal protection of the laws (even if there is a "rational basis") if the state has available to it a less onerous alternative. This principle was applied, for example, in *Carrington v. Rash,* 380 U.S. 89 (1965), which held invalid under the equal protection clause a denial by Texas to some servicemen of the opportunity to vote. Texas had a rational basis for doing so; instances of servicemen from other states who could prove bona fide residence in Texas would be too infrequent to justify the administrative costs of going into individual cases.

"States," the Court said, "may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State," the Court pointing out that Texas had devised procedures to make individual determinations of residence with respect to other categories of individuals who might be only temporarily in the state. 380 U.S. at 96. This principle has more recently been applied in an education context in *Green v. County School Board of New Kent County, Virginia,* 88 Sup. Ct. 1689 (1968) (freedom of choice desegregation plan-alternatives available).

5. In the constitutional sense, there is no "legitimate legislative policy" or a "rational basis" supporting the financing scheme because giving school districts widely disparate amounts of revenue bears no reasonable relationship to any educational purpose. Although it is emotionally appealing to talk about "local control," "local responsibil-

ity," and "experimentation," there is no rational reason why all of those goals cannot be accomplished without the onerous discriminations of the present scheme. Equally important, the state has not (and cannot) advanced any rational reason why one school district must have two or three times as much as another district to further those goals. Finally, the system has no rational basis because the larger sums do not go to the children with greater educational needs. On the contrary, it is obvious that the children with the greatest educational needs, those living in large urban areas, poverty communities, and minority group ghettos, are receiving (under the financing scheme) the most inadequate education.

III. The Complaint Pleads Sound Causes of Action Under Applicable Law.

The state has assumed responsibility for educating its children. It chooses to carry out this most crucial duty by creating school districts to provide education for all children residing therein. These schools are financed through the joint effort of the state and local governments. The locally raised funds primarily come from property taxes, and these local funds determine the quality of educational opportunity that is provided within that school district. This scheme of financing results in some children receiving grossly inferior educational opportunity as compared with other children in the state. The scheme is one which discriminates against children on the basis of where they live and the wealth of the school district in which they live.

Equality of educational opportunity is an interest of critical significance to Illinois, to California, and the whole of society.

The injury to the children who receive an inferior education is of major import. These are the children who will

grow up unprepared to engage in self-supporting occupations, who will be unable to form stable family relationships, who will not participate in voting or governing and who will be unable to give *their* children a better start in life. The state, having assumed this vital responsibility, is required by the U. S. Constitution to provide equal educational opportunity to all of its children regardless of race, creed, wealth or geographical location. *Brown v. Bd. of Educ., supra; Griffin v. County School Board, supra; Hall v. St. Helena Parish School Board,* 197 F. Supp. 649 (Ed. La. 1961), *Aff'd* 368 U.S. 515 (1962). The State cannot avoid this constitutional guaranty by delegation to smaller units. *Hall v. St. Helena, supra.*

This scheme creates de facto wealth classifications which have been rendered suspect at best by *Harper v. Va. Bd. of Elections, supra,* and the long line of criminal procedure cases beginning with *Griffin v. Illinois, supra.* Such wealth classifications may stand only if there exists constitutionally adequate justifications. The purposes served by the local school districting do not justify the particular districting in Illinois, except to the extent that the districting scheme is designed to discriminate by wealth, and that kind of design is clearly impermissible under the Fourteenth Amendment.

This scheme of financing also results in de facto discrimination against minority groups. The minority groups in our society are disproportionately among the poor. These are the same people who are now restricted by this scheme to an inferior education. The system intensifies all the problems inherent in segregation, and creates an educational system in the State closely analogous to the "track system" found unconstitutional in *Hobson v. Hanson,* 269 F. Supp. 401 (DDC 1967). Discrimination based on race or nationality

in many of its guises, has been held repeatedly unconstitutional in *Brown v. Bd. of Educ., supra* and its progeny.

This scheme further creates discrimination based on geographical location. Such geographical weighting may be the result of a so-called "rational" scheme and yet be unreasonable and unconstitutional. *Reynolds v. Sims, supra.* As the Court said this does

> "not necessarily mean that . . . [the] plan is irrational . . . We conclude simply that . . . [the] plan is impermissible for the States under the Equal Protection Clause . . . ." 377 U.S. at 533.

The child's educational opportunity may not be diluted or destroyed because he happens to live in one place rather than another. *Griffin v. County School Bd., supra; Hall v. St. Helen's Parish, supra.*

CONCLUSION

The court below erred in procedurally assuming facts not in evidence and in sustaining the demurrer without testimony as to judicially manageable standards or even evidence as to how the financing structure operates in fact. The court erred substantively in finding that a rational explanation was sufficient to justify an admitted unequal treatment of school children. There is no evidence before the court of a significant rational basis for the present scheme of financing. Moreover, even if there were, a "rational basis" is not automatically a constitutionally adequate basis. See also *Reynolds v. Sims,* 377 U.S. 533 (1964). When a system of classification inflicts injury of a significant magnitude, and certainly when there are alternative means to achieve legitimate governmental goals by using means which inflict less or no injury the classification scheme is unconstitutional. *Carrington v. Rash,* 380 U.S. 89 (1965);

Shelton v. Tucker, 364 U.S. 479 (1960); *Douglas v. California,* 372 U.S. 353 (1963); *Anders v. Calif.,* 386 U.S. 738 (1967); *Green v. School Board,* 88 S. Ct. 1689 (1968); *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Hobson v. Hanson, supra.*

There are alternative means available for government to achieve the legitimate goals advanced by local school districting while lessening the magnitude of injury to plaintiffs. In other words, several possibilities exist which will permit local control and still provide equal educational opportunity. A discussion of some of these alternatives is contained in the Amici Brief of Coons, Clune, and Sugarman, filed in the instant case. Where governmental action creates inequality of educational opportunity, the State has an obligation to use all reasonably feasible means of ameliorating the inequality while advancing other purposes. *Jackson v. Pasadena School Bd.,* 59 Cal.2d 876, 382 P. 878 (1963); *Green v. County School Board,* 88 S. Ct. 1689 (1968); *Hobson v. Hanson, supra.* Accordingly, this Court should note probable jurisdiction and either postpone consideration on the merits or reverse the lower court.

Dated: February 5, 1969.

Respectfully submitted,

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Attorney for Amici Curiae